Supreme Court, U. S.
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No. 80-568

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, et al.,

Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., et al.,

Respondents.

BRIEF OF RESPONDENT INSTITUTE OF SCRAP IRON AND STEEL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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This brief in opposition to the petition for writ of certiorari of the principal Eastern, Western and Southern railroads ("the railroads") is filed by Respondent, Institute of Scrap Iron and Steel, Inc. ("ISIS"). ISIS is a non-profit trade association incorporated in the State of New York with its principal place of business in Washington, D. C. ISIS members process, ship and otherwise handle approximately ninety to ninety-five percent of the iron and steel scrap purchased in the United States. ISIS was petitioner in

Case No. 79-1395, consolidated with Case No. 79-1393, *National Association of Recycling Industries* v. *Interstate Commerce Commission,* D.C.C.A., hereafter referred to as "NARI II". Pet. App. C.

STATEMENT OF FACTS

A. The History of Ex Parte No. 319

In its statement of facts the railroads infer that the *Ex Parte No. 319* investigation was the result of attempts by the recycling industry to obtain preferential legislation.[1] Omitted by the railroads from their recitation of the history of *Ex Parte No. 319* is the deep concern for the nation's environment voiced by Congress in numerous legislative acts, and its related fear that railroad freight rates contributed to environmental damage. *National Association of Recycling Industries* v. *Interstate Commerce Commission,* 585 F.2d 522 (D.C. Cir. 1978), cert. den., 440, U.S. 929 (1979) (hereinafter "NARI I") at 531.

Of particular note is § 603 of the Regional Rail Reorganization Act of 1973, Pub.L. 93-236, 87 Stat. 1023, directing the Commission to "adopt appropriate rules" to "eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists."

The virtual indifference to § 603 by the Commission led in part to the enactment of § 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-120, 90 Stat. 40[2] and the *Ex Parte No. 319* proceeding. *NARI I,* 585 F.2d, 522 at 532.

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[1] Pet. p. 2.

[2] Hereinafter referred to as the Regulatory Reform Act.

Also omitted by the railroads from its statement of facts is that § 204 reversed the rules governing the burden of proof and placed on the railroads the burden of justifying the rate structures on recyclables. *NARI I,* 585 F.2d 522 at 533.

According to the railroads the Court below, in reversing the Commission's initial decision in *Ex Parte No. 319,* did not disturb the Commission's Environmental Impact Statement which they allege concluded that railroad rates had no significant impact on the level of recycling.[3]

It is curious to speculate as to the reasons for raising the Environmental Impact Statement at this time since it was not the subject of appeal. More importantly, contrary to the railroads' assertion, the Commission specifically found that holddowns on increases in rates on recyclables would "improve the competitive position and quantity demanded of recyclables" with the result that there would be "positive impacts on the environment" and the creation of "a shift in demand from virgin to recyclable materials".[4]

B. The Continuing Rate Adjustment Process

The railroads assert that the assailed order of August 15, 1980 requires that all "continuing general and specific adjustments should stop" and that the order imposes a "rate freeze".[5] This is far from true.

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[3] Pet. p. 5.

[4] *Ex Parte No. 319,* Final Environmental Impact Statement, January 4, 1977. p. 5-5. See also the Commission's finding in *Ex Parte No. 319* "that freight rates have an effect on the movement of recyclable materials." *Ex Parte No. 319,* 361 I.C.C. 238 at 241-242, Pet. App. 6(d).

[5] Pet. p. 7.

The Court below, both in its decision of April 25, 1980, *NARI II,* [Pet. App. 27 (c)], and its order of August 25, 1980 [Pet. App. 2 (b)] specified that general rate increases were permissible.

Of more significance to this Court's decision whether to grant certiorari are two factors which moot the entire proceedings.

On October 14, 1980, the Staggers Rail Act of 1980 was enacted deregulating the railroads,[6] and on October 20, 1980 the Interstate Commerce Commission stated in a report to the Court of Appeals that it expected to establish a standard of reasonableness for all recyclables including iron and steel scrap within the next two months. See Res. App. A.

ARGUMENT

The railroads' petition for certiorari paints a fictional scenario of an injunction against any freight rate increases on recyclables in direct defiance of *United States* v. *SCRAP,* 412 U.S. 69 (1973) ("SCRAP I") resulting in irreparable damages to the railroads. Closer examination of the facts dispels the fog and destroys the myth.

First, not all rate increases on recyclables are enjoined. As stated previously, the Court of Appeals, both in its April 25, 1980 decision and its August 15, 1980 order, make it clear that the railroads are free to impose general rate increases on recyclables provided virgin commodities are similarly raised. The stipulation that virgin commodities and recyclables be given the same increase, is

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[6] Pub. L. 96-448, enacted Oct. 14, 1980. Pet. App. 7e.

consistent with the finding of both the Court and the Interstate Commerce Commission that recyclables and virgin commodities compete.

It was primarily the issue of competition which occupied the forefront of litigation involving ISIS, the railroads and the Commission for almost twenty years.[7] Initially in *Ex Parte No. 319* the Commission found no competition between recyclable and virgin commodities. However, following the admonition of the Court of Appeals in *NARI I*, the Commission, on remand, reversed its position. On appeal, the Court of Appeals affirmed the Commission's finding of competition holding that its position was "reasonable and in accordance with law". *NARI II*, Pet. App. 16 (c). Presumably the competition issue is finally at rest after twenty years of litigation.

Second, this case differs sharply from that presented in *SCRAP I* in that both the Commission and the Court were proceeding under § 204 of the Regulatory Reform Act which specifically directs an investigation into the rate structure on recyclables, unlike *SCRAP I* which evolved from a general rate increase proceeding in which the lawfulness of increases on specific commodities was not at issue. Surely upon the Commission's having found discrimination in the rate structure, the Court of Appeals by virtue of § 204 had the authority to supervise its remedy.

Finally, petitioners assert that as a result of the lower Court's order, the Eastern railroads will lose $5,000,000 in freight revenues per year of which loss $3,400,000 will be sustained by Conrail. In support of this assertion, petitioners cite an affidavit of Gerald Robinson filed in this Court in support of its application for stay. Pet. p. 10, Fn.

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[7] See *NARI I*, 585 F.2d 522 at 528, Fn. 21.

15. The affidavit is devoid of supporting data or information. It contains no facts – merely the bald statement of possible loss.

Considering the fact that the Eastern railroads' total operating revenue for 1979 was nearly $9.2 billion, $5,000,000 represents an insignificant .05%. To assert that the loss of such an infinitesimal percentage of revenue constitutes irreparable harm is absurd, both statistically and in view of new pricing freedoms available to improve carriers' earnings.

More telling is the lack of relief for shippers of recyclables whose commodities are precluded from moving because of continuing rate barriers maintained by the carriers. *NARI I,* 585 F.2d 522 at 535. There are no reparations for commodities which do not move.

Then too, what relief is there for the public which would realize energy savings, conservation of depletable natural resources and reduction in air and water pollution by increased utilization of recyclables in lieu of virgin materials? *NARI I,* 585 F.2d 522 at 531. There are no reparations for foregone environmental benefits.

Since the inception of the *Ex Parte No. 319* proceeding, the railroads have repeatedly emphasized their revenue needs as a justification for maintaining a discriminatory freight rate structure on recyclables. A sympathetic Interstate Commerce Commission frequently alluded to those needs in its initial decision. However, in reversing the Commission the Court of Appeals noted that the railroads' profitability was not to be given greater weight than the environmental and energy goals specified by Congress. *NARI I,* 585 F.2d 522 at 534 and 535.

In short, the fact that the lengthly *Ex Parte No. 319* proceedings will soon be concluded, coupled with the

deregulation of the railroads by virtue of the Staggers Rail Act of 1980, renders the assailed order of little precedential value in a case which will soon be moot. This is hardly a matter of such public interest as to warrant plenary review.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 14, 1980

APPENDIX A

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

October 20, 1980

OFFICE OF THE GENERAL COUNSEL

George A. Fisher, Clerk
United States Court of Appeals
D.C. Circuit
3rd & Constitution Ave., N.W.
Room 5419
Washington, D.C. 20001

Re: No. 79-1393, National Association of Recycling Industries, Inc. v. I.C.C. and U.S.A. and consolidated cases
(G.C. File No. 3933)

Dear Mr. Fisher:

This is to report to the Court on the Commission's actions on remand in these proceedings as well as certain pertinent developments since the Court's remand.

To review the Court's decisions in this case, the Court, in a decision entered April 25, 1980: (1) upheld the Commission's conclusion and analysis that the railroad rate structure in several instances discriminated against recyclable materials; (2) reversed and remanded the Commission's remedy for discrimination; and (3) remanded the Commission's determination of maximum reasonable rate levels on the ground the Commission had not adequately explained why it arrived at a revenue/variable costs ratio of a 180 percent as a standard.

In its April decision, the Court directed the Commission to conclude its actions with respect to the remedy for discrimination within six months (Slip op. 28). With regard to the standard of reasonableness, the Court instructed the Commission to file a report with the Court in six months stating the Commission's progress on this issue and an expected completion date (*Id.*).

In a order on rehearing entered on August 15, 1980, the Court appears to have reversed the Commission's priorities on remand that it had initially imposed in its April 25, 1980, decision. Thus, the August 15 order directed the Commission to first deal with the reasonableness question, and only, thereafter, to consider appropriate remedies for discrimination (Order, page 2).

In addition, new legislation has been enacted that is pertinent to the Commission's responsibilities on remand. On October 14, 1980, President Carter signed the Staggers Rail Act of 1980. Section 204 of the Act provides, *inter alia,* that within 90 days the railroads are to reduce or maintain rates on recyclables, with the exception of scrap iron and steel, at level of reasonableness that provides the railroads a fair rate of return. Although not explicitly stated in Section 204, the legislative history indicates that this standard is to be established by the Commission. Cong. Rec. H9919 (daily ed. Sept. 29, 1980); S. Rep. No. 96-470, 96th Cong., 1st Sess. 18-19, 33-34, 51, 61-62.

Thus, by Congressional directive, the Commission is now required to immediately establish a standard of reasonableness to be applied to all recyclables, except scrap iron and steel. Pursuant to this Court's remand, however, the Commission must also establish a standard for scrap iron and steel. The Commission must act within approximately two months in order to meet the 90-day deadline

in the Staggers Act for railroad compliance. The Commission intends to simultaneously establish a standard for scrap iron and steel.

After this, the Commission will deal promptly with the issue of discrimination.

An original and three copies of this letter are enclosed for distribution to the Court.

Sincerely yours,

/s/ RICHARD A. ALLEN
General Counsel
Interstate Commerce Commission
(202) 275-7312

cc: All Parties of Record